Hepworth J.: The appellant, who is a licensed moneylender, issued a summons in the Magistrate's Court, Penang, claiming from the respondents the sum of $100 lent on a promissory note together with 4½ months' interest thereon at the rate of 18% per annum. The learned Magistrate dismissed the moneylender's claim although the defendants were absent and had not filed their defence when the case was called on for trial. The appellant appealed.

The grounds upon which the learned Magistrate dismissed the appellant's claim was that a perusal of the promissory note concerned revealed that it was not attested in accordance with section 27 of the Moneylenders Ordinance, 1951, in that it was a promissory note written in the English language and it was not attested by any of the persons specified in that section as is required if the borrower is a person not understanding the written language on such note. The learned Magistrate took the view that if the respondents understood the written language of the note then the appellant should have pleaded this fact. This fact was not pleaded and accordingly the appellant's claim must fail because the promissory note was void.

It is necessary to consider whether the objection taken to the promissory note by the learned Magistrate could properly be taken by him. Where an action is brought upon a contract and the point is not taken by the defendant that the contract is illegal there are two cases in which the Judge may intervene and refuse to enforce the contract. These are clearly set out by Lush J. in a judgment of the Divisional Court in *Lipton* v. *Powell* [1], the subject matter of which was a moneylending transaction. The learned Judge said:—

> "One of these cases is that in which the contract *ex facie* shows illegality. Many instances of actions on contracts which are plainly illegal are to be found in the reports. In a case of that kind the Court is entitled and indeed bound to intervene and refuse to enforce the contract, because 'No Court ought to enforce an illegal contract . . . if the illegality is duly brought to the notice of the Court'; *per* Lindley L.J. in *Scott* v. *Brown, Doering, McNab & Co.* ([1892] 2 Q.B. 724, 728), adopted by Cozens-Hardy M.R. in *In re Robinson's Settlement* ([1912] 1 Ch. 717, 725).
>
> The other case in which the judge may refuse to enforce the contract is that in which, although *ex facie* the contract is legal, yet in the course of the proceedings an admission is made or evidence is given by which its illegality clearly appears. If, for example, in an action like the present the plaintiff were to admit that he was unregistered, or the defendant were to give evidence that the plaintiff was unregistered, the illegality would be brought to the notice of the Court, and the Court would refuse to enforce the contract just as if the illegality had appeared upon the face of the contract.
>
> In a case coming within either of those two classes of cases the Court is apprised of the fact that it is being asked to enforce an illegal contract, and it may and ought to refuse to do so."

The promissory note with which we are concerned was legal on the face of it. It would only be illegal if the borrowers did not understand the English language. There was nothing to indicate that they did not understand the English language and accordingly it could not be said that the contract *ex facie* showed illegality. (As a matter of fact perhaps no more than passing interest a letter received in the High Court Registry from the respondents makes it abundantly clear that in fact they could both read and write the English language with fluency).

Secondly, as the respondents had not filed a defence and were absent when the case was called on for trial there was no question of an admission being made or evidence being given from which the promissory note's illegality clearly appeared. It was accordingly not open to the learned Magistrate to take the objection himself which he did. As Lord Haldane L.C. said in *North Western Salt Co.* v. *Electrolytic Alkali Co.* [2]:—

> "My Lords, it is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the Court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality."

It is clear from these cases that unless a defendant raises the defence of the illegality of the contract on the pleadings then he cannot rely upon it and, except where the contract is on the face of it illegal or its illegality is brought to the notice of the Court, even the Court has no right to intervene.

I accordingly allowed the appeal, set aside the judgment of the learned Magistrate and ordered the deposit paid into Court by the appellant to be paid back to him. As the appellant did not ask for costs I made no order as to costs.

Appeal allowed.

THE ASIA INSURANCE CO. LTD. v. CHAN WING & SONS REALTY CO. LTD.

[C.A. (Thomson C.J., Hill and Good JJ.A.)
May 17, 1962]

[K.L. — F.M. Civil Appeal No. 37 of 1961]

Nuisance — Vibration by piling operations — Structural damage — Old building — Measure of damages — Difference between money value of building before and after damage.

This was an appeal from the decision of Ong J. ([1962] M.L.J. 40) on the question of the assessment of damages. In allowing the appeal the Court of Appeal,

Held: the value of the premises is the improved value of the land at the relevant time, that is the value of the

land together with the value of the building, there being no evidence at all in this case as to the unimproved value of the land. The land itself being building land which had suffered no damage, its unimproved value can be disregarded in calculating the loss to the reversion suffered by the defendants (appellants in this appeal). The amount of that loss can be ascertained by subtracting the value of the building after the damage had been caused from its previous value. On the evidence the plaintiffs (respondents in this appeal) cannot be expected to recover more than $5,000.

Cases referred to:—

(1) *Hosking* v. *Phillips* (1848) 3 Ex. 168.
(2) *Moss* v. *Christchurch* [1925] 2 K.B. 750.
(3) *Lodge Holes Colliery Co. Ltd.* v. *Wednesbury Corporation* [1908] A.C. 323.
(4) *The Mayor &c., of Wednesbury* v. *The Lodge Holes Colliery Co. Ltd.* [1907] 1 K.B. 78.
(5) *The Mayor &c. of Wednesbury* v. *The Lodge Holes Colliery Co. Ltd.* [1905] 2 K.B. 823.
(6) *Jones* v. *Gooday* 8 M. & W. 146.

COURT OF APPEAL.

A. L. Hills for the appellants.

S. D. K. Peddie for the respondents.

Cur. Adv. Vult.

Thomson C.J.: The plaintiffs in this case are the proprietors of a piece of land in the old Chinese portion of Kuala Lumpur with a frontage on Klyne Street on which, at No. 49, there is a building of the shophouse type occupied by a firm of solicitors as tenants at a controlled rent of $120 a month. Until some time in 1951 the plaintiffs were also the proprietors of the adjacent piece of land on which there was at one time a building which was demolished in 1938. In 1951 the plaintiffs sold this adjacent piece of land to the defendant company and it is common ground, though the point is now of little importance, that they knew the defendant company bought it with the intention of erecting a building on it.

About the middle of 1957 the defendants, by their agents, started building operations on the land. These operations were discussed in great detail at the subsequent trial but only calls for brief description here. First, large numbers of piles were driven in, apparently with great violence, an operation that is painfully familiar to residents in modern Kuala Lumpur. Then excavations for the foundations were made. It is well known that in this part of Kuala Lumpur the water table is very near the surface and the result of excavation was that water flowed in from out of the soil of the surrounding land, including that of the plaintiffs, bringing with it some soil in the form of silt.

The piling operation caused vibration to the house on the plaintiffs' land; cracks began to appear in the walls; then cracks appeared in the floor and the roof began to leak. After excavation began the cracks increased in extent, the walls began to bulge and it became necessary to shore up the roof. The tenants, although they suffered very considerable annoyance and disturbance, continued in occupation, but the ultimate result so far as concerned the building was that it suffered considerable damage and will have to be re-built or very extensive repairs will have to be effected.

On 18th March, 1959, the plaintiffs issued the writ in the present proceedings. In their statement of claim they set out the damage which they said had been caused to their building by the operations of the defendants particularly the piling and the excavation; they alleged that the building "cannot be adequately restored by piecemeal repairs to its former condition as it stood before it was so damaged except by rebuilding the entire building"; and they claimed as damages $50,720. $50,000 of that amount was for "costs of rebuilding and replacement" of the building and $720 was for loss of rents during the period of reconstruction, that is for the loss of six months' rent at $120 a month.

The case came on for hearing before Ong J. on 22nd August, 1960. He reserved judgment and on 6th November, 1961, he gave judgment in favour of the plaintiffs for $10,720. Prior to the trial the defendants had paid $10,000 into Court. The effect of the amount awarded as damages, though this was not known to the Judge when he assessed it, was thus that they were condemned in the whole costs of the action.

Against that judgment the defendants have now appealed.

The appeal is against the judgment as a whole, but counsel for the appellants has very fairly conceded that his clients cannot escape all liability and that in effect what they are appealing against is the amount of the damages. In the circumstances I do not think it is necessary for this Court to consider the case as a whole.

The first ground on which the amount of the damages was attacked was that the trial Judge had in effect found that the defendants' piling operations were the cause of the whole of the damage to the premises at No. 49, Klyne Street. It was urged that the damage should have been attributed in some part to the withdrawal of sub-soil water and the withdrawal of lateral support as a result of the excavation work. The argument went on that, while the defendants might be liable for damage caused by unreasonably intensive piling operations, they could not in law be held liable for the damage caused by the excavation. This argument raises questions as to the existence in this country of rights analogous to easements which, to my mind, are of the very greatest difficulty and which would depend for their answer upon an exhaustive examination of the provisions of the Land Code. In this connection the decisions of English Courts relating to the English land law would be of little assistance although there may be decisions of the Australian Courts which might be of help. I think, however, I am absolved from dealing with the difficulty for this reason. I have read the evidence with great care and although it is clear that some of the damage to the premises

occurred after the cessation of piling and the commencement of excavation there is not a word to show that this damage was caused by the excavation in the sense that it would have occurred had the building not been previously badly shaken by the antecedent piling. On that view, if it be correct, the defendants must compensate the plaintiffs for all the damage that has been done.

On the general question of damages it is important to observe that the plaintiffs are not the occupiers of 49, Klyne Street. They are the owners and the reversioners. In such a case I think it is well-settled law that the measure of damages is the diminution in value of the reversion (see *Hosking* v. *Phillips* [1] and *Moss* v. *Christchurch* [2]). In the present case the estate in possession was only a monthly tenancy and although the premises are rent-controlled the Control of Rent Ordinance since 1956 has been expressed to lapse at the end of every period of twelve months unless continued in force by the local Ruler in Council. In the circumstances the true measure of damages would seem to be the difference between the value of the premises immediately before the piling operations began and their value at the time of the trial.

That proposition was, I think, accepted by the learned trial Judge. He took the view, however, that there was no evidence as to these values and that there being no material on which an assessment could be made on that basis he must base himself on the estimates of the cost of repairs given by the various expert witnesses. He dealt with the matter as follows:—

> "It is, of course, manifest that the plaintiffs are not entitled to have a new house at the defendants' cost in place of the old. On the other hand, it is equally clear that the defendants should not be permitted to dictate in what manner and to what extent restoration or repair should be executed. Nor, I think, should I assess the value of the premises before and after damage as if it were a mere shell of a house, severed from the land, consisting of bricks, mortar and timber. A useful yardstick, in the circumstances, would appear to be the repair costs given by the experts. In round figures such costs have been stated by the plaintiffs' witness to be $16,000 and by the defendants' witness to be $4,000. The latter agreed that execution of the works required by the plaintiffs would cost almost $10,000. These requirements appear to me quite reasonable."

He accordingly assessed the damages at $10,000 and added the sum of $720 claimed for loss of rent making a total of $10,720.

With great respect I do not think it is correct to say that there is no evidence as to the value of the premises before and after the damage was done. The value in each case is, of course, the improved value of the land at the relevant time, that is the value of the land together with the value of the building, and there is no evidence at all as to what would be the unimproved value of the land. The land itself, however, is building land and has suffered no damage and so it follows that its unimproved value can be disregarded in calculating the loss to the reversion suffered by the defendants. The amount of that loss can be ascertained by subtracting the value of the building after the damage had been caused from its previous value.

On that point there was a certain amount of evidence. It may not be very satisfactory evidence, but it was there. If it is perhaps somewhat meagre the plaintiffs themselves must take some of the responsibility. On the pleadings they claimed for the cost of replacement of the building which they then laid at $50,000 and in opening his case counsel for the plaintiffs said the estimated cost of rebuilding was $24,000. In the circumstances they might have been expected to have produced a considerable volume of evidence relating to values, whereas in fact they produced very little.

I turn now to the evidence which was produced.

Mr. Au-Yong Peng Choon, one of the tenants, said he had lived all his life in Kuala Lumpur and that to his personal knowledge the building had been in existence since at least 1925. Mr. Ross, a consulting engineer called for the plaintiffs, said that the building appeared old but it was in a satisfactory condition for its purpose. He had seen houses of its age in very much worse condition. He went on to say that the extent of the damage "makes repairing work substantially a rebuilding". He also said that the house was a type of building common 60 years ago when brick and lime-mortar were used and that lime-mortar is not as strong as cement. If filling of the cracks was done by cement the material filling the cracks would be the strongest part of the wall.

Mr. James Lee Soo Chuan, an architect called by the plaintiffs, dealt with the damage in detail and then stated that the rebuilding of the premises would cost $26,936.42. He said he thought the house was about 60 years old and if not subjected to external force would stand for another 10 to 20 years.

Mr. Peter William Sanderson was a chartered quantity surveyor called by the defendants and was also a fire assessor for insurance companies. He said that in his opinion the value of the building excluding the land in April, 1957, that is to say before the piling operations commenced, would be $5,000. That, he said, would be the market value. This opinion was not contradicted by any other witness and was supported by the evidence of Mr. Ng Keng Seang. This witness, a chartered architect called for the defendants, said that the house was 50 to 70 years old built of brick and lime-mortar with timber floor and ceiling and Chinese tile roof. The normal life of such a building would be less than a hundred years. Like Mr. Sanderson he put the value of the building in 1957, before the piling commenced, at $5,000. He said that 80% of the timber work in the building had reached its maximum life and that dry rot had already set in. He said that a new shophouse of the same size and type could be built for under

$15,000 and that the value of the present building for demolition purposes would be about $800.

At the time of the trial, three years after the building had been damaged, the tenants were still in occupation of the building and although various steps had been taken by the defendants to support it nothing had been done by the plaintiffs either in the way of rebuilding or of effecting repairs. For this there may well have been some reasonable explanation. For one thing the plaintiff company is in voluntary liquidation. Again the premises are subject to the provisions of the Control of Rent Ordinance and for reasons which have already been pointed out it is a matter of constant speculation how long that Ordinance will remain in force. Again, it is unlikely that any prudent landowner faced with a problem of rebuilding on this site would build a shophouse like the present building, because it is notorious that for some years now land in this part of the town has risen in value to such an extent that it can only be economically used for the erection on it of many-storied buildings. All that is clear. Nevertheless the fact remains that nothing having been spent, no steps having been taken, the damages must be based on the somewhat inadequate evidence which has been related. If the plaintiffs had rebuilt a shophouse they would have known what it cost them and it would have been possible to apply some appropriate reduction. If instead of rebuilding they had repaired then they could have told the Court the cost of the repairs and it would have been for the Court to say whether these repairs were reasonable to restore the premises to something like the former condition or whether they involved some degree of improvement to the property for which the defendants should not be made to pay. On the evidence as it stands, however, subject to one point to be discussed shortly, I do not see how they can expect to recover more than $5,000 having regard to that evidence, for what it is worth, as to the value of the building before any damage was caused to it, the break-up value of the building on demolition and any possible loss of rent during rebuilding.

To my mind that is the end of the matter except that a few words should perhaps be said regarding an argument urged before us which was admittedly not advanced at the trial. That was that by reason of the provisions of the Municipal Ordinance the plaintiffs were under a legal obligations to repair the damage which has been done and that they were consequently entitled to be compensated to the full extent of the cost of such repairs. That argument was said to find support in the decision of the House of Lords in the case of *Lodge Holes Colliery Co. Ltd.* v. *Wednesbury Corporation* [3].

In that case the House of Lords reversed a decision of the Court of Appeal [4] which in its turn had reversed the decision of Jelf J. [5]. For myself I should have said that the case had very little application here for it turned very largely on the special position as a highway authority of the original plaintiff whose road had suffered damage as a result of subterranean operations on the part of the defendant company. It was, however, observed by Collins M.R. in the Court of Appeal (at p. 83):—

> "Some authorities were cited by the respondents to support the proposition that in cases of trespasses to land the measure of damage was not the cost of restoring the *status quo ante*, but the difference in value of the *locus* before and after. But those authorities, of which *Jones* v. *Gooday* [6] is the chief, obviously have no application to an action on the case by the person who is under an obligation, as here, to make good the mischief. The damages in such a case must clearly be, not the depreciation in value attributable to the injuria, but the cost of reparation."

On that I hope it is unnecessary to point out that the word used is "reparation" and not "repair".

The law is, of course, as stated in that passage by the then Master of the Rolls. It is difficult to see, however, that it has any application to the present case.

The statutory position here is that by reason of section 169 of the Municipal Ordinance if a building is in any way dangerous it is deemed to be a nuisance and liable to be dealt with summarily in accordance with the provisions of the Ordinance. By section 246(1) on the receipt of any information regarding a nuisance the Commissioner (as he now is) shall, if satisfied as to its existence, serve a notice on the person by whose act, default or sufferance it arises requiring it to be abated and to execute such works for that purpose as may be specified. By subsection (3) of section 246 where the nuisance arises from any want or defect of a structural character the notice is to be served on the owner. Once it is served the owner is under a statutory legal obligation to comply with its terms. Here, however, no notice under the Ordinance has been served on the plaintiffs. It is true that two notices were served at different times on the defendants and there is nothing to show that they have not been complied with by them. In the circumstances, however, it is impossible to say that so far as the Municipal Ordinance is concerned, and the point has been taken no further, the plaintiffs were at any material time under any legal obligation to do anything and in view of the fact that over two years had elapsed between the occurrence of the damage and the date of the trial it would be unreasonable to suppose, in the

absence of any evidence to the contrary, that any steps against the plaintiffs were in the contemplation of the Commissioner.

In all the circumstances I would allow the appeal to the extent that I would reduce the amount of the damages awarded to $5,000. There should be a consequential variation of the order for costs which should be that the plaintiffs should have their costs down to the date of payment into Court and the defendants should have their costs thereafter, such costs to be taxed with mutual set-off and the money to remain in Court pending taxation and the balance, if any, to be applied in the first instance to the payment of the plaintiffs' damages, any balance to be paid out to the defendant company.

The appellants should have the costs of this appeal.

Hill and **Good JJ.A.** concurred.

Appeal allowed in part.

Solicitors: *Donaldson & Burkinshaw; Bannon & Bailey.*

THE PERAK IRON MINING CO. LTD. v. CHONG VOON KIM

[C.A. (Thomson C.J., Hill and Good JJ.A.) May 17, 1962]

[Ipoh — F.M. Civil Appeal No. 39 of 1961]

Contract — Constructive agreement — Claim for "repair charges and goods supplied" — Contracts (Malay States) Ordinance, 1950, s.71.

Practice and Procedure — O.14 r.1.

This was an appeal against the decision of Azmi J. who gave summary judgment in favour of the respondent on a claim for $16,956.40 for "repair charges and goods supplied" which the appellants did not deny. Their only defence was that there was no contractual relationship between the parties and that they had never requested the respondent to do the work or to provide the goods.

Held: in view of section 71 of the Contracts (Malay States) Ordinance, 1950 the pleadings of the appellants had not shown that they had any defence and the trial judge was right in entering summary judgment for the respondent.

Principles to be applied in relation to O.14 clarified in *Jacobs* v. *Booth's Distillery Co.* (10) adopted.

Cases referred to:—

(1) *Lloyd's Banking Co.* v. *Ogle* (1875-6) 1 Ex. Div. 262.
(2) *Saw* v. *Hakin* (1888) 5 T.L.R. 72.
(3) *Lindsay* v. *Martin* (1888-89) 5 T.L.R. 322.
(4) *Ironclad Gold Mining Co.* v. *Gardner* (1887) 4 T.L.R. 18.
(5) *Ray* v. *Barker* (1879) 4 Ex. Div. 279.
(6) *Electric & General Contract Corpn.* v. *Thomson-Houston Electric Co.* (1893) 10 T.L.R. 103.
(7) *Carnegie* v. *Conner* (1889) 6 T.L.R. 12.
(8) *Jones* v. *Stone* [1894] A.C. 122.
(9) *Thompson* v. *Marshall* (1879) 41 L.T. (N.S.) 720.
(10) *Jacobs* v. *Booth's Distillery Company* (1901) 85 L.T. 262.
(11) *Thorne* v. *Seel* [1878] W.N. 215, C.A.

COURT OF APPEAL.

Ng Ek Tiong for the appellants.

Abdul Rahim Noor for the respondent.

Cur. Adv. Vult.

Thomson C.J.: I have had the advantage of reading the judgment of Mr. Justice Hill with which I agree.

I would only add the observation that the plaintiff's claim as endorsed on the Writ was for "repair charges and goods supplied". It was not for work done for the defendant "at his request" and "for goods sold and delivered". It is thus clear that the claim was not based on any express or implied agreement to pay, but on what might be described as a constructive agreement arising from the terms of section 71 of the Contracts (Malay States) Ordinance, 1950, which as is observed in *Pollock and Mulla's* book on the *Indian Contract Act* (8th Edition), page 424 "goes far beyond English law".

To this claim no defence was pleaded, although a defence was pleaded to a claim which was not made, that is a claim based on an express or implied agreement to pay. This may have been done through inadvertence but it is to be noted that no attempt has been made by the defendant at any time to amend his pleading.

Hill J.A.: Cases referred to *Lloyd's Banking Co.* v. *Ogle* (1), *Saw* v. *Hakin* (2), *Lindsay* v. *Martin* (3), *Ironclad Gold Mining Co.* v. *Gardner* (4), *Ray* v. *Barker* (5), *Electric & General Contract Corpn.* v. *Thomson-Houston Electric Co.* (6), *Carnegie* v. *Conner* (7), *Jones* v. *Stone* (8), *Thompson* v. *Marshall* (9).

This appeal is concerned with an application by the plaintiff/respondent under Order 14 rule 1 in the High Court at Ipoh for liberty to sign final judgment against the defendant/appellant.

The plaintiff's claim was for the sum of $16,956.40 for repair charges and goods supplied. The defendant did not deny that the repair work had been performed and the goods supplied, but stated that there was no contractual relationship between the parties and that the defendant had never requested the plaintiff to do the work or to provide the goods.

Azmi J. who heard the application, held that the defendant company had failed to show that they had a good defence to the action on the merits or that the facts disclosed would entitle them to defend the action generally and he gave summary judgment in favour of the plaintiff. In view of section 71 of the Contracts (Malay States) Ordinance, 1950, I do not consider that on the pleadings the defendant company had shewn that it had any defence and I respectfully agree with the view held by Azmi J.

Section 71 reads as follows:—

"71. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."